

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6165

To be argued by
Wayne R. Lehrhaupt for M.I.T.
Ronald S. Herzog for Princeton

UNITED STATES COURT OF APPEALS

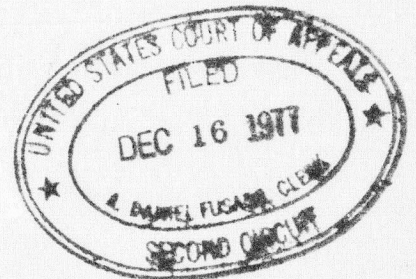
For the Second Circuit

ANNA SELMA VINJE MORPURGO,
Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA, BOARD OF
HIGHER EDUCATION N.Y.C., MASSACHUSETTS
INSTITUTE OF TECHNOLOGY, PRINCETON
UNIVERSITY, and RICHARD KLEINDIENST,
WILLIAM SAXBE, EDWARD H. LEVI, HENRY
KISSINGER, MARY MOTHERSILL, ALFRED A.
GIARDINO, ROBERT J. KIBBEE, DAVID
NEWTON, HAROLD M. PROSHANSKY, HANS J.
HILLERBRAND, ARNOLD KOSLOW, ABRAHAM
EDEL, JULIUS ELIAS, GERALD MYERS,
ANDREW J. McLAUGHLIN, JASON SAUNDERS,
VIRGINIA HELD, PETER CAWS, RUDOLPH
GREWE, C.S. HONG, ROBERTA THORNTON,
NORMA REES, NAPTHALI LEWIS, KURT
SCHMELLER,

Defendants-Appellees.



On Appeal from the United States District Court for the
Southern District of New York

JOINT BRIEF FOR DEFENDANTS-APPELLEES, MASSACHUSETTS
INSTITUTE OF TECHNOLOGY AND PRINCETON UNIVERSITY

WIEN, LANE & MALKIN
Attorneys for Defendant-
Appellee Massachusetts
Institute of Technology
60 East 42nd Street
New York, New York 10017
212-687-8700

JACKSON & NASH
Attorney for Defendant-
Appellee Princeton
University
330 Madison Avenue
New York, New York 10017
212-949-0700

TABLE OF CONTENTS

	<u>Page</u>
Preliminary Statement	1
Counter-Statement of Issue Presented	3
Statement of the Case	4
Statement of Facts	7
Summary of Argument	10

ARGUMENT

POINT I:	Conclusory Allegations Do Not Set Forth a Claim Against M.I.T. or Princeton Pursuant to the Conspiracy Provisions of 42 U.S.C. § 1985 or for Violation of Plaintiff's Constitutional Rights	11
POINT II:	The Second Amended Complaint Fails to State a Claim Against M.I.T. or Princeton for Which Relief Can be Granted Under the Federal Higher Education Act	18
POINT III:	Plaintiff Has No Claim Against M.I.T. or Princeton For Violations of Title VII of the Civil Rights Act of 1964	19
CONCLUSION		20

TABLE OF CASES
AND AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<u>Cannon v. University of Chicago</u> , 559 F.2d 1063 (7th Cir. 1976)	19
<u>Covington County Bank v. R. J. Allen & Associates, Inc.</u> , 389 F. Supp. 415 (M.D. Ala. 1975)	20
<u>M. G. Davis & Co. v. Securities and Exchange Commission</u> , 252 F. Supp. 402 (S.D.N.Y. 1966)	12
<u>Fine v. City of New York</u> , 529 F.2d 70 (2nd Cir. 1975)	16
<u>Furumoto v. Lyman</u> , 362 F. Supp. 1267 (N.D. Cal. 1973)	15
<u>Girard v. 94th Street & Fifth Avenue Corp.</u> , 530 F.2d 66 (2nd Cir.), <u>cert. denied</u> , 425 U.S. 974 (1976)	13,14
<u>Griffin v. Breckenridge</u> , 403 U.S. 88 (1971)	14,16
<u>Hill v. McClellan</u> , 490 F.2d 859 (5th Cir. 1974)	13
<u>Morpurgo v. Board of Higher Education in City of New York</u> , 423 F. Supp. 704 (S.D.N.Y. 1976)	3,10
<u>Sams v. New York State of Board of Parole</u> , 352 F. Supp. 296 (S.D.N.Y. 1972)	13,14
<u>San Antonio Independent School District v. Rodriguez</u> , 411 U.S. 1 (1973)	17
<u>Stern v. Massachusetts Indemnity & Life Insurance Co.</u> , 365 F. Supp. 433 (E.D. Pa. 1973)	15
<u>Waits v. McGowan</u> , 516 F.2d 203 (3rd Cir. 1975)	13

* * *

STATUTES:

Title VI and IX of the Federal Higher Education Act, 20 U.S.C. §§ 1121 - 1132, 1134, 1134s	18,19
The Civil Rights Act, 42 U.S.C. § 1985(3)	12

Page

Title VII of the Civil Rights Act of 1964, 42 U.S.C.	
§§ 2000-e, et seq	19,20

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 77-6165

ANNA SELMA VINJE MORPURGO,
Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA, BOARD OF
HIGHER EDUCATION N.Y.C., MASSACHUSETTS
INSTITUTE OF TECHNOLOGY, PRINCETON
UNIVERSITY, and RICHARD KLEINDIENST,
WILLIAM SAXBE, EDWARD H. LEVI, HENRY
KISSINGER, MARY MOTHERSILL, ALFRED A.
GIARDINO, ROBERT J. KIBBEE, DAVID
NEWTON, HAROLD M. PROSHANSKY, HANS J.
HILLERBRAND, ARNOLD KOSLOW, ABRAHAM
EDEL, JULIUS ELIAS, GERALD MYERS,
ANDREW J. McLAUGHLIN, JASON SAUNDERS,
VIRGINIA HELD, PETER CAWS, RUDOLPH
GREWE, C.S. HONG, ROBERTA THORNTON,
NORMA REES, NAPTHALI LEWIS, KURT
SCHMELLER,

Defendants-Appellees.

JOINT BRIEF FOR DEFENDANTS-APPELLEES, MASSACHUSETTS
INSTITUTE OF TECHNOLOGY AND PRINCETON UNIVERSITY

PRELIMINARY STATEMENT

Plaintiff-Appellant, a former adjunct lecturer in
the Philosophy Department at Queensboro Community College,
("QCC") a division of the City University of New York ("CUNY"),

and former student enrolled in the doctoral program at CUNY, has commenced three separate actions alleging violations of her rights under 42 U.S.C. § 1985 (pertaining to conspiracies to deprive persons of constitutional and civil rights), Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000-e et.seq., (referring to equal employment opportunities), Titles VI and IX of the Higher Education Act (20 U.S.C. §§ 1121-1132 and 1134-1134s) and the First, Fourth, Fifth and Ninth Amendments to the United States Constitution. The alleged violations arose, for the most part, from the termination of plaintiff's studies in CUNY's doctoral program and its refusal to renew her teaching contract at QCC. Plaintiff's actions have been brought against various agencies, individuals and academic institutions alleged to be involved in a wide-ranging conspiracy to deny plaintiff her civil and constitutional rights.

Subsequent to plaintiff's termination at CUNY's doctoral program, she sought admission to other educational programs and research projects, including those at Massachusetts Institute of Technology ("M.I.T.") and Princeton University ("Princeton") in 1975 and 1976. Her applications to both institutions were rejected, eventuating in their inclusion in this action, allegedly for having voluntarily complied with unspecified directives of federal agencies in rejecting plaintiff's applications.

The court below (Edward Weinfeld, J.) previously dismissed plaintiff's original complaint against, inter alia, M.I.T. and Princeton, a first Amended Complaint and finally, a Second Amended Complaint^{*} based upon vague, conclusory and imprecise allegations which did not provide defendants with fair notice of any claims against them and which failed to state a claim upon which relief could be granted.

COUNTER-STATEMENT OF ISSUE PRESENTED

Did the District Court err in holding that plaintiff's Second Amended Complaint failed to state a claim upon which relief could be granted against defendants-appellees M.I.T. and Princeton?

In ordering the dismissal with prejudice of plaintiff's Second Amended Complaint against M.I.T. and Princeton, the Court held:

- (a) That plaintiff had failed to plead, with even minimal particularity, facts which would indicate the existence of a conspiracy against her or the involvement of M.I.T. or Princeton in such a conspiracy;
- (b) That plaintiff's conclusory allegations that the rejections of her application to M.I.T. and Princeton graduate programs were

★

Morpurgo v. Bd. of Higher Ed. in City of New York, et al, 423 F. Supp. 704 (S.D.N.Y. 1976).

the product of sexual or racial discrimination were wholly unsupported by any factual averments;

(c) That plaintiff's conclusory allegations that the rejections of her applications to M.I.T. and Princeton graduate programs were due to some racial or other invidiously discriminatory animus were similarly totally devoid of any factual basis.

STATEMENT OF THE CASE

This is an appeal by plaintiff from an order (Exhibit 5)* dated November 18, 1976 and judgment (Exhibit 1) entered thereon in the United States District Court for the Southern District of New York on August 2, 1977 granting the separate motions for summary judgment of, inter alia, defendants M.I.T. and Princeton and dismissing plaintiff's Second Amended Complaint with prejudice. The Second Amended Complaint (Exhibit 2A), filed on or about March 31, 1976, sought injunctive and declaratory relief, as well as substantial compensatory and punitive damages.

Plaintiff alleged below that she was the subject of a vast conspiracy in violation of her constitutional and civil rights. M.I.T. and Princeton's participation in the conspiracy was allegedly limited to their voluntary compliance with directives of certain unspecified federal agencies which instruc-

*Appellees M.I.T. and Princeton must make reference to the documents contained in plaintiff's joint and combined appendix, rather than to the specific page of the appendix, as plaintiff failed to serve a copy of the appendix upon appellees.

ted the educational institutions to reject plaintiff's applications to their graduate programs in 1975 and 1976, even though plaintiff alleged she was the "most qualified applicant under affirmative action programs" (Id. ¶¶26 and 27).

Thus, plaintiff alleged (Id. ¶12) that "the acts complained of form part of a wide conspiracy to interfere with the civil rights and Constitutional liberties and rights of members of Plaintiff's class" (Id. ¶¶13 and 14). She goes on to allege that she has been classified by the government as an "undesirable," has been excluded from classified research and from access to research programs and grants for which she was qualified (Id. ¶¶15-19); that the individual defendants are withholding evidence of counter-intelligence activity performed against her (Id. ¶20); that the defendant Board of Higher Education of the City of New York ("BHE") "in obedience to confidential federal directives," ordered her terminated from matriculation in scientifically-connected doctoral programs at CUNY (Id. ¶21); that in 1975 and 1976 she applied for matriculation in the doctoral program in Philosophy at M.I.T. and for financial aid and teaching assistantships (Id. ¶23a); that similar applications were made at Princeton (Id. ¶23b); that federal agencies (which she does not identify) directed the administrations of M.I.T. and Princeton to reject her applications and that the administrations "voluntarily complied" with the unlawful federal directive "and hence

are conspiring with federal agencies and employees to interfere with" her civil and constitutional rights (Id. ¶¶25 and 28); that she was "the most qualified applicant" and her rejection by M.I.T. and Princeton "was an act of sex and race discrimination" (Id. ¶¶26 and 27); and that the individual defendants performed various acts in violation of her rights (Id. ¶¶29-34).

The remaining paragraphs of the complaint set forth twelve "causes of action," only four of which refer to M.I.T. or Princeton. In the "Fourth Cause of Action" (Id. ¶38) plaintiff claims that she has been "denied matriculation, for which she was a best qualified applicant," (sic) in violation of Titles VI and IX of the Federal Higher Education Act and also 42 U.S.C § 1985 "insofar as such denial was the result of federal intervention in Princeton admissions policies." In the "Sixth Cause of Action" (Id. ¶40) she claims that the admission to matriculation in the philosophy doctoral program of less qualified persons at Princeton violates Titles VI and IX of the Federal Higher Education Act and Title VII of the Civil Rights Act of 1964 "wherever such admission was accompanied by teaching employment." Identical allegations are leveled against M.I.T. in the Fifth and Seventh Causes of Action, respectively (Id. ¶¶38 and 41).

In its papers below, M.I.T. and Princeton, which had previously moved successfully against plaintiff's prior plead-

ings, sought dismissal of plaintiff's second amended complaint for failure to state a claim upon which relief could be granted. The court below, which had previously dismissed plaintiff's original complaint and first Amended Complaint for failure to allege facts that would entitle her to relief against the defendant educational institutions, held that these deficiencies had not been corrected in the Second Amended Complaint, which, as its predecessors, was replete with conclusory allegations, wholly unsupported by any factual averments. Accordingly, the Second Amended Complaint was dismissed with prejudice.

STATEMENT OF FACTS

On or about February 15, 1973 the Executive Committee of BHE approved the recommendation of the BHE's Evaluations Committee that the plaintiff be severed from the doctoral program at CUNY (Exhibit 19). This severance led to CUNY's refusal to renew plaintiff's contract as an adjunct lecturer at QCC, a division of CUNY.

Plaintiff initially sought to reverse the decision to terminate her participation in the CUNY doctoral program in New York State Supreme Court, contending that the decision of the BHE was arbitrary and capricious. Plaintiff derived no solace from her state court action, as the court held her dismissal was adequately justified by, inter alia, her eleven separate failures to pass various parts of the comprehensive

examinations required of all doctoral candidates. Having failed to achieve reinstatement from the state court, plaintiff brought the first of her numerous suits in this court, predicated jurisdiction upon the following: alleged violations of 42 U.S.C. § 1985, involving conspiracies to deprive persons of constitutional and civil rights; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. With the intervening passage of time, during which she was denied admission to the doctoral programs at both M.I.T. and Princeton, plaintiff broadened her charges and increased the number of her lawsuits, until, in the apt words of Judge Weinfield, they "encompass[ed] all who came within her path, before, at the time of and subsequent to her rejections" (Exhibit 5, page 1). At present, plaintiff's various complaints name as defendants, in addition to M.I.T. and Princeton, the United States of America, three former Attorneys General of the United States, a former Secretary of State, the BHE, the New York State Division of Human Rights, the Professional Staff Congress/CUNY ("PSC"), plaintiff's former attorneys, and various individuals. These defendants, it is alleged, participated in a vast conspiracy to deprive plaintiff of her constitutional and civil rights.

The conspiracy assertedly originated when plaintiff's participation in the CUNY doctoral program was terminated. Essentially, it appears to be plaintiff's claim that the United States of America, former high governmental officials, and unspecified federal agencies engineered an immense conspiracy to deny her

admittance into various doctoral programs and to prevent her from obtaining employment or matriculation although she was the most qualified applicant under various affirmative action programs. The involvement of M.I.T. and Princeton in the alleged conspiracy and ensuing cover-up is, however, limited by plaintiff's pleadings to the alleged voluntary compliance of their respective administrations with unspecified federal directives to reject plaintiff's applications to their doctoral programs, thereby overriding plaintiff's acceptances by the philosophy faculties of both institutions in both 1975 and 1976.

In apparent deference to plaintiff's pro se status, the court below presented plaintiff with three separate opportunities to draft a complaint in conformity with the liberal requirements of Rule 8(a) of the Federal Rules of Civil Procedure. Plaintiff's initial complaint, described by the court as "a diatribe replete with conclusory allegations" (Exhibit 27 at page 2) was dismissed for failure to state a claim against, inter alia, defendants M.I.T. and Princeton; however, plaintiff was given leave to replead. Plaintiff's First Amended Complaint was also found to be legally insufficient by the court below, which nevertheless presented plaintiff with "one more opportunity". . . to allege facts that would entitle her to relief against [M.I.T. and Princeton]" (Exhibit 28 at page 2).

Plaintiff's Second Amended Complaint, the dismissal of which forms the basis of this appeal, was also found to be

legally insufficient, the court finding that, once again, plaintiff had failed to plead with even minimal particularity facts that would indicate the existence of a conspiracy against her or the involvement of the defendant educational institutions in such a conspiracy. Morpurgo v. Bd. of Higher Education in the City of New York, supra, 423 F. Supp. at 719 (footnote omitted). Despite three prior dismissals for total noncompliance with the pleading requirements of the Federal Rules, plaintiff has now appealed from the dismissal of her complaint with prejudice.

SUMMARY OF ARGUMENT

Appellees M.I.T. and Princeton intend to demonstrate that plaintiff's conclusory allegations, which form the basis for her claim that these institutions violated her constitutional and civil rights, render the Second Amended Complaint insufficient as a matter of law and that dismissal of the Second Amended Complaint in the court below was entirely proper.

It will also be demonstrated that no claim has been stated against either school under the Federal Higher Education Act, Titles VI and IX, and that there is no private and individual right of action for alleged sex discrimination under Title IX. Similarly, it will be shown that plaintiff has failed to make any evidentiary showing that either school violated her civil rights under Title VII of the Civil Rights Act of 1964 by

failing to make teaching assistantships available to her in view of the fact that she was never accepted into their respective graduate programs.

ARGUMENT

I.

CONCLUSORY ALLEGATIONS DO NOT SET FORTH A CLAIM AGAINST M.I.T. OR PRINCETON PURSUANT TO THE CONSPIRACY PROVISIONS OF 42 U.S.C. § 1985 OR FOR VIOLATION OF PLAINTIFF'S CONSTITUTIONAL RIGHTS

In dismissing plaintiff's original complaint by memorandum decision dated December 31, 1975, (Exhibit 27) the court below pointed out that the complaint does not "recite the interactions among the various unrelated defendants which constitute the purported 'conspiracy'" (Id. at page 3). Plaintiff then filed an amended complaint, which was dismissed as to M.I.T. and Princeton by a memorandum decision dated March 17, 1976, because the

. . . vague and conclusory allegations do not indicate the wrong MIT or Princeton supposedly committed or the manner in which they conspired with the other named defendants (Exhibit 28 at page 2).

In her Second Amended Complaint, plaintiff alleged that the United States, by an unnamed federal agency, "directed" M.I.T. and Princeton to reject her applications. She alleged that M.I.T. and Princeton "voluntarily complied with an unlawful federal directive, and hence [are] conspiring with federal agencies and employees to interfere with" her civil and con-

stitutional rights in violation of 42 U.S.C. § 1985 and the First Amendment (Exhibit 2A, ¶28). In her Fourth and Fifth Causes of Action in her Second Amended Complaint, (Id., ¶¶ 38, 39) plaintiff claimed that the denial of matriculation violates 42 U.S.C. § 1985 "insofar as such denial was the result of federal intervention" in M.I.T. and Princeton's admissions policies. Therefore, the question presented is whether this alleged compliance with a government directive not to admit plaintiff states a claim for relief under § 1985.

Section 1985(3) provides:

If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

It is submitted that no claim has been stated for violation of this statute, for the following reasons:

1. The United States and federal agencies of the United States are immune from suit absent their consent. Covington County Bank v. R. J. Allen & Associates, Inc., 389 F. Supp. 415 (M.D. Ala. 1975); M. G. Davis & Co. v. Securities and Exchange Commission, 252 F. Supp. 402, 403 (S.D.N.Y. 1966).

Nowhere has plaintiff alleged or demonstrated that these unspecified Federal agencies have consented to be brought into this action as defendants. In an action alleging a conspiracy in violation of § 1985, it has clearly been held that a private person cannot be deemed to have conspired with another immune from suit under the section. Waits v. McGowan, 516 F.2d 203, 205 (3d Cir. 1975); see Hill v. McClellan, 490 F.2d 859, 860 (5th Cir. 1974). Accordingly, M.I.T. and Princeton cannot, as a matter of law, be held liable in this suit under § 1985.

2. Even if the pleading properly alleged a conspiracy, it would nevertheless be insufficient to state a claim:

A legally sufficient §1985(3) complaint must aver a conspiracy between two or more persons intended to deprive any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the law and an act by one of the conspirators in furtherance of the conspiracy which injured another person or deprived him of exercising any right or privilege of a citizen of the United States. See Griffin v. Breckinridge, (sic) supra, 403 U.S. at 102-103, 91 S. Ct. 1790; Cameron v. Brock, 473 F.2d 608, 610 (6th Cir. 1973).

Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66, 70 (2d Cir.), cert. denied, 425 U.S. 974 (1976). As stated in Sams v. New York State Board of Parole, 352 F. Supp. 296, 302 (S.D.N.Y. 1972), claims under § 1985(3) must be dismissed in the absence of "any allegation of a purposeful intent to discriminate as to constitu-

tional rights between classes or individuals." The Second Amended Complaint in the section of the pleading entitled "Allegations," (Exhibit 2A, ¶¶ 11-34) merely sets forth the conclusion that there exists "a wide conspiracy" to interfere with plaintiff's rights. However, plaintiff has failed to set forth any facts (or even conclusory allegations) from which it could be concluded that M.I.T. or Princeton "intended to deprive" plaintiff of her constitutional rights. Girard v. 94th St. & Fifth Ave. Corp., supra. The claim that both schools voluntarily complied with a "directive" issued by a federal agency does not support plaintiff's contention that the schools were parties to a conspiracy, for plaintiff does not allege that in complying with the "directive" M.I.T. and Princeton had the "purposeful intent" referred to in Sams v. New York State Board of Parole, supra. Indeed, if plaintiff's allegations are to be believed, it follows that M.I.T. and Princeton were not conspiring with the United States (or anyone else) but, rather, that they were the victims of improper government acts.

3. The third reason why plaintiff has not stated a claim under § 1985(3) is based on the holding in Griffin v. Breckenridge, 403 U.S. 88, 101-102 (1971):

That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. . . . The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory

animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all. (Emphasis by the Court) (footnotes omitted).

See also Furumoto v. Lyman, 362 F. Supp. 1267, 1286 (N.D. Cal. 1973). Plaintiff claims that she is "of ambiguous race" (Exhibit 2A, ¶13) which hardly is a proper foundation for a § 1985(3) race discrimination conspiracy claim; and there have been no decisions in this Circuit or by the Supreme Court holding that a sex discrimination claim can be brought under that statute.* Moreover it is apparent that race and sex discrimination do not constitute the real basis for plaintiff's claims for relief. In the Second Amended Complaint's Fourth and Fifth Causes of Action (Id., ¶¶38 and 39) she claims only that federal intervention in each schools' admissions policies (apparently referring to the directives which M.I.T. and Princeton allegedly received from the unspecified federal agency) resulted in her being denied matriculation; and her Sixth and Seventh Causes of Actions (Id., ¶¶40 and 41) also make no reference to race or sex discrimination, for they state only that "less qualified" persons were admitted to matriculation. These "causes of action" do not state claims for violation of any

*Some courts have so held. For example, in Stern v. Massachusetts Indemnity and Life Ins. Co., 365 F. Supp. 433, 442-43 (E.D. Pa. 1973) it was held that the language of Griffin does not foreclose "complaints that allege a class-based motivation which is nonracial," although it was recognized that a more narrow view of the statute "is shared by some commentators."

right to equal protection of the laws or equal privileges and immunities under the law, for they are not predicated on the racial or other class-based invidious discrimination referred to by the Supreme Court in the Griffin case.

In any event, it is clear that plaintiff has failed to set forth any facts tending to show that either school has admissions policies which directly or indirectly discriminate against women or persons of a particular race. The pleading merely sets forth the unsupported conclusion that plaintiff "was the most qualified applicant under affirmative action and her rejection was an act of sex and race discrimination, not a legitimate and lawful act of exclusion" (Exhibit 2A, ¶26). In fact, plaintiff's claim of sex discrimination is particularly confusing as she seems to take the position that she should not have been denied matriculation at M.I.T. or Princeton under their affirmative action program (Exhibit 2A, ¶26), therefore apparently claiming that she was denied admission in spite of her sex, and not because of it.

As stated by Chief Judge Kaufman in Fine v. City of New York, 529 F.2d 70, 73 (2d Cir. 1975):

Complaints relying upon 42 U.S.C. § 1981 et seq. are plainly insufficient unless they contain at least some allegations of facts indicating a deprivation of civil rights. Powell v. Jarvis, 460 F.2d 551, 553 (2d Cir. 1970) (sic). See also Birnbaum v. Trussell, 347 F.2d 86, 89-90 (2d Cir. 1965); Powell v. Workmen's Compensation Bd., 327 F.2d 131, 136 (2d Cir. 1964).

The requirement that a plaintiff must plead at least some facts showing a claim for relief applies to all complaints, including complaints claiming violations of rights, privileges and immunities granted by the Constitution. The conclusory allegations of plaintiff's Second Amended Complaint are insufficient not only to state a claim for relief under § 1985(3) but also to the extent they are asserted for the purpose of showing a violation of the various constitutional amendments cited in the pleading.

Furthermore, the pleading fails to specify the constitutionally guaranteed right, privilege or immunity of plaintiff which M.I.T. and Princeton violated or infringed upon. Certainly it cannot be a right, as the "most qualified applicant," to be admitted to graduate programs at M.I.T. and Princeton for the Supreme Court has held that "education, of course, is not among the rights afforded explicit [or implicit] protection under the Federal Constitution." San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 35 (1973).

The conclusory allegations which form the basis for plaintiff's claim that M.I.T. and Princeton violated her constitutional and civil rights render the Second Amended Complaint insufficient as a matter of law to state a claim for relief against either institution. To hold otherwise would be tantamount to the adoption of a rule that any person who is denied admission to an institution of higher education will be entitled

to bring an action in federal court solely on the basis of a brief conclusory allegation that persons less qualified than the plaintiff were admitted to the institution or that the rejection of the plaintiff's application was an act of sex or race discrimination. It is submitted that a complaint which pleads nothing more than such conclusions cannot be sustained and therefore the court below properly dismissed it.

II.

THE SECOND AMENDED COMPLAINT FAILS TO STATE
A CLAIM AGAINST M.I.T. OR PRINCETON FOR
WHICH RELIEF CAN BE GRANTED UNDER THE FEDERAL
HIGHER EDUCATION ACT

In the December 31, 1975 memorandum decision dismissing plaintiff's original complaint (Exhibit 27 at page 2) the court stated:

Nowhere in the complaint does plaintiff allege the manner in which her rejection by these institutions was wrongful, either under the Federal Higher Education Act or under the United States Constitution.

In plaintiff's Second Amended Complaint, it is claimed in the Fourth, Fifth, Sixth and Seventh "causes of action" that plaintiff was better qualified than other persons admitted to matriculation in the philosophy doctoral programs at M.I.T. and Princeton and therefore her rejection was in violation of Titles VI and IX of the Federal Higher Education Act.

The statutory provisions upon which plaintiff purports to rely have no application to her claims. Title VI, 20 U.S.C.

§§ 1121-1132, authorize equipment grants and grants for faculty development programs as part of the government's policy of providing financial assistance for the improvement of undergraduate instruction. Title IX, 20 U.S.C. §§ 1134-1134s, authorizes various types of grants in connection with graduate and professional programs. While Title IX prohibits sex discrimination in federally assisted educational institutions, it does not provide nor create a private, individual right of action. Plaintiff's inability to proceed under Title IX is based upon the holding in Cannon v. University of Chicago, 559 F.2d 1063, 1082 (7th Cir. 1976) where the court, in construing the legislative history of this provision, held:

[A] sophisticated scheme of administrative enforcement should be construed as an indication of an implicit legislative intent to excuse any private judicial remedies for violations of Title IX

III.

PLAINTIFF HAS NO CLAIM AGAINST M.I.T. OR
PRINCETON FOR VIOLATIONS OF TITLE VII OF
THE CIVIL RIGHTS ACT OF 1964

In paragraphs 23a and 23b of the Second Amended Complaint (Exhibit 2A) plaintiff alleges that she applied for matriculation in the doctoral programs in philosophy and also for "all financial aid and teaching assistantships accompanying acceptance of her application." In her "Seventh Cause of Action" she states that the admission to matriculation of less qualified

persons violates Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-1 et seq "wherever such admission was accompanied by teaching appointments." Section 2000e-2(a) states that it shall be an unlawful employment practice for an employer

to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

The implication of the allegations of paragraphs 23a and 23b is that teaching assistantships are available only to qualified and matriculated students. Therefore, even if it is assumed, arguendo, that teaching assistantships are within the purview of Title VII, it is clear that plaintiff has not stated a claim for relief under that statute. Because teaching assistantships at M.I.T. and Princeton are given only to graduate students enrolled at that institution, in order to state a claim for violation of § 2000e-2(a) plaintiff must have alleged that she was a graduate student at the time her application for a teaching assistantship was rejected. Having failed to so allege, the complaint was properly dismissed as to Title VII of the Civil Rights Act of 1964.

CONCLUSION

It is respectfully submitted that plaintiff has failed to show adequate grounds to reverse the Order and Judgment of the

court below and that the dismissal of the Second Amendment Complaint was entirely proper. It is respectfully urged that the Order dismissing the Second Amended Complaint as to M.I.T. and Princeton and the Judgment entered thereon be affirmed.

Dated: December 12, 1977

Respectfully submitted,

OF COUNSEL:

Wayne R. Lehrhaupt

Wien, Lane & Malkin
Attorneys for Defendant-Appellee
Massachusetts Institute of Technology
60 East 42nd Street
New York, New York 10017

OF COUNSEL:

Ronald S. Herzog

Jackson & Nash
Attorneys for Defendant-Appellee
Princeton University
330 Madison Avenue
New York, New York 10017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
ANNA SELMA VINJE MORPURGO, : Docket No. 77-6165
 :
Plaintiff-Appellant, :
 : AFFIDAVIT OF SERVICE
v. : BY MAIL
 :
UNITED STATES OF AMERICA, et al., :
 :
Defendants-Appellees. :
-----X

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

RONALD S. HERZOG, being duly sworn, deposes and
says:

1. I am associated with the firm of Jackson &
Nash, attorneys for defendant-appellee, Princeton University,
in the above matter.

2. On December 16, 1977, I mailed two copies of
the Joint Brief of defendant-appellees, Princeton University
and Massachusetts Institute of Technology, by regular mail
in the United States Post Office mailbox at 330 Madison Avenue,
New York, New York to the following:

Anna Selma Vinje Morpurgo, pro se
Box 1091
Sag Harbor, New York 11963

Patterson, Belknap, Webb & Tyler
Attorneys for Mary Mothersill
30 Rockefeller Plaza
New York, New York

Rosemary Carroll, Esq.
Office of Corporation Counsel
New York City
Municipal Building
New York, New York 10007

Robert B. Fiske, Jr.
U. S. Attorney for the Southern
District of New York
Nathaniel L. Gerber, Esq.
U. S. Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007

Robert G. Desmond, Esq.
60 East 42nd Street
New York, New York 10017

D. Nicholas Russo, Esq.
Professional Staff Congress/C.U.N.Y.
25 West 43rd Street
New York, New York 10036

Edwin L. Smith, Esq.
Anthony M. Lanzone & Associates
26 Broadway
New York, New York 10006

Ronald S. Herzog

Ronald S. Herzog

Sworn to before me this
16th day of December, 1977.

Barry J. O'Toole
Notary Public

BARRY J. O'TOOLE
Notary Public, State of New York
No. 24-2985600
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1979